85-1097

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ARTHUR CHAMBLESS and MILDRED H. CHAMBLESS,

Petitioners,

—against—

MASTERS, MATES & PILOTS PENSION PLAN, et al.,

Cross-Petitioners.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Should an amendment to the regulations of a pension plan be held "arbitrary and capricious" and unlawful under ERISA because the plan trustees adopted it on the basis of their own knowledge of industry trends affecting the long term financial stability of the plan, without the advice of an actuary that such amendment was financially necessary?

2. Do pension plan trustees have the burden of proving that a rule adopted to enhance the trust corpus in fact fulfilled that purpose and that alternative methods of achieving the same goal existed and were considered?

3. In the case of a jointly-administered, multi-employer pension plan, is the fact that an amendment to the plan was proposed by union-designated trustees and drafted by counsel to the plan appointed by the union-designated trustees evidence that the amendment was adopted to benefit the union and not to enhance the financial integrity of the plan?

PARTIES TO THE PROCEEDING BELOW

Arthur Chambless and Mildred H. Chambless,

Plaintiffs-Appellees,
Cross-Appellants,

Masters, Mates & Pilots Pension Plan, Stephen P. Maher, Administrator of the Masters, Mates & Pilots Pension Plan, C.J. Bracco, Richard M. Casselberry, Michael Di Prisco, E. Gras, George Groh, Justin Gross, James R. Hammer, James J. Hayes, Martin F. Hickey, Charles Jess, Francis E. Kyser, Charles Landry, Orion A. Larson, Robert J. Lowen, Lloyd Martin, J. Eric May, David Merritt, Thomas E. Murphy, Henri L. Nereaux, William Ott, Martin Pecil, Franklin J. Riley, Jr., William I. Ristine, A.C. Scott, Capt. John Smith, Rupert Soriano, Ernest Swanson, Michael Swayne, Allen Taylor, Nicholas Telesmanic, Kenneth P. Wenthen, C.E. Whitcomb, in their fiduciary capacity as Trustees of the Masters, Mates & Pilots Pension Plan,

Defendants-Appellants,
Cross-Appellees,

Amerada Hess Corporation, Amoco Shipping Company, Central Gulf Lines, Inc., American Maritime Association, National Transport Corp., Wabash Transport, Inc., Maritime Services Committee, Inc., International Organization of Masters, Maters & Pilots,

Defendants, Cross-Appellees.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-

ARTHUR CHAMBLESS and MILDRED H. CHAMBLESS,

Petitioners,

—against—

MASTERS, MATES, & PILOTS PENSION PLAN, et al.,

Cross-Petitioners.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Cross-petitioners M.M.&P. Pension Plan and M.M.&P. Pension Plan Trustees cross-petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit issued in this case on August 28, 1985.

OPINIONS BELOW

Cross-petitioners seek review of a decision of the United States Court of Appeals for the Second Circuit, *Chambless* v. *Masters, Mates & Pilots Pension Plan*, 772 F.2d 1032 (2d Cir. 1985), affirming a decision after trial of the United States District Court for the Southern District of New York, reported at 602 F. Supp. 904 (S.D.N.Y. 1984) and an earlier decision of the District Court, reported at 571 F. Supp. 1430 (S.D.N.Y. 1983).

JURISDICTION

The judgment of the Court of Appeals is dated August 28, 1985 and was entered on that date.

This cross-petition is filed pursuant to Rule 19.5 of the Rules of this Court. The petition for certiorari in connection with which the cross-petition is filed (No. 85-930) was received on November 29, 1985.

This Court has jurisdiction to review the decision of the Court of Appeals under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The statute involved is § 404(a) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. § 1104(a), which provides, in relevant part:

> (1) Subject to sections 1103(c) and (d), 1342 and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—
>
> (A) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries; and
>
> (ii) defraying reasonable expenses of administering the plan.

STATEMENT OF THE CASE

The M.M.&P. Pension Plan (the "Plan") is a multi-employer plan established to provide pension benefits to licensed deck officers who retire from sailing in the American Merchant Marine. It is jointly administered by an equal number of employer-designated and union-designated Trustees, as re-

quired by § 302(c)(5) of the Labor Management Relations Act of 1947 ("LMRA"), 29 U.S.C. § 186(c)(5), and in accordance with regulations adopted by the Trustees of the Plan (the "Plan Regulations"). The funds used to provide benefits under the Plan are contributed solely by the participating employers. (Pet. App. A-3–A-4)[1]

Cross-respondent Arthur Chambless ("Chambless") sailed as a member of the International Organization of Masters, Mates & Pilots (the "IOMM&P" or "Union") from 1944 until 1977, as, at various times, a third mate, second mate, chief mate and master. In November 1976, Chambless applied for pension benefits, but shortly thereafter withdrew his application and continued employment aboard vessels covered by collective bargaining agreements with the IOMM&P ("IOMM&P-contracted vessels"). (Pet. App. A-6)

Chambless submitted a second application for pension benefits in early April 1977. Upon receipt of each of Chambless' applications, the Plan sent him a letter of acknowledgment notifying him of the Plan's requirement that he "retire" within the meaning of the Plan's definition of "retirement" and advising him to direct any questions concerning his retirement to the Plan Administrator. (*Id.*)

Chambless' Failure to Retire Within the Meaning of the Plan Regulations

In order to receive pension benefits, a participant must "retire" within the meaning of the Plan Regulations. When Chambless applied for pension benefits in April 1977, Article II-A, Section 15(a) of the Plan Regulations provided, in relevant part, that "[t]o be considered retired, a person must

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1 References to pages in petitioner's appendix in No. 85-930 are designated as "Pet. App. ____." References to pages in the trial transcript are designated as "R. ____." References to plaintiffs' and defendants' trial exhibits are designated as "PX ____" and "DX ____," respectively.

withdraw completely from any further employment, in any capacity, aboard any vessel whatsoever." (Pet. App. A-4)

During the processing of Chambless' 1977 application, the Plan received information that he was working aboard a vessel and, therefore, had not retired within the meaning of the Plan Regulations. The Plan also learned that the vessel upon which Chambless had worked was operated by a company not contributing to the Plan. In response to the Plan's inquiry, Chambless confirmed this information. (Pet. App. A-7)

By letter dated January 26, 1978, Chambless was advised that: (1) the Trustees had denied his application for pension benefits because he had not retired within the meaning of the Plan Regulations; and (2) in accordance with Amendment 47 to the Plan Requlations, the payment of any benefits would be deferred until he reached "normal retirement age," defined by Article I, Section 13 of the Plan as age 65. (Pet. App. A-7, A-17)

The Adoption of Amendment 47

Amendment 47 to the Plan Regulations, adopted in August 1976, provides that, if a participant works as a licensed deck officer on a U.S. flag ocean-going vessel operated by a company not contributing to the Plan, his benefits will be deferred until normal retirement age. It reads, in pertinent part:

> In the event a Participant, subsequent to his accrual of credit for 10 years of vesting service and prior to his retirement, is employed in the capacity of a Licensed Deck officer on a U.S. flag ocean going vessel employed by a company which is not a participant in the M.M.&P. Pension Plan or the MM&P/PMA Pension Plan . . . , such Participant shall not be entitled to any pension benefits prior to his reaching his Normal Retirement Age, as defined in Article I, Section 13.

(Pet. App. A-5)

The substance of Amendment 47 was first considered at a July 28, 1976 sub-committee meeting of the Trustees. (R. 263) The minutes of that meeting reflect the thrust of the discussions:

> In order to limit the activity of pensioners working in employment contrary to the best interests of the M.M.&P. Pension Plan, it was suggested that in the event a pensioner works in employment forbidden by the Section, the pension for the month or months of such employment could be withheld and, in addition, it could be provided that suspension of payment could continue until the pensioner reaches the age of 65.

(PX-27, Attachment G; R. 276-277, 281)

On August 24, 1976, before the next Trustees' meeting, another sub-committee meeting was held. (R. 277) The minutes of that meeting show that the substance of Amendment 47 was again considered:

> Mr. Epstein [Plan co-counsel] reviewed with the Sub-Committee the Definition of Retirement as contained in the Pension regulations and application of it to Pensioners working in prohibited employment, in particular with companies not participating in the Pension Plan, as well as application of the Rules to active employees eligible to pension but still sailing.

(PX-27, Attachment H; R. 87, 277) Amendment 47 was then presented and adopted at the Trustees' meeting on August 26, 1976. (R. 277-278; DX-R)

The purpose of Amendment 47 was to preserve and enhance the corpus of the Plan by discouraging participants from making their services available to non-contributing employers. This, the Trustees believed, would induce non-contributing employers to participate in the Plan in order to obtain access to trained licensed deck officers. (R. 802-816)

The Trustees were concerned about maintaining an adequate contribution base, *i.e.*, sufficient employment opportunities aboard vessels covered by the Plan to generate adequate employer contributions. For a variety of reasons, maritime employment had been decreasing, causing a reduction in Plan contributions, which are based on days of employment. The Trustees, noting this trend, attempted to protect the Plan from the effect of dwindling employment opportunities (and dwindling contributions) through the adoption of Amendment 47. (*Id.*)

The Trustees' concern about the Plan's future financial stability, in the face of these industry trends, was confirmed by the Actuarial Valuation and Review of the Plan for the year ending December 31, 1975. That report noted that the number of participating active employees had decreased from the previous year. Moreover, the resulting decrease in the contribution base was not offset by the Plan's return on its investments. In 1975, the Plan earned a total net investment return of only 5.09%—a decrease from 5.33% earned in 1974. (DX-T)

Finally, if the costs of maintaining the Plan became too expensive, employers could (before enactment of the Multiemployer Pension Plan Amendments Act of 1980) withdraw from the Plan, without any obligation to contribute their proportionate share of the cost of unfunded liability. Concern about this possibility was reflected not only by the adoption of Amendment 47, but also by the terms of the 1975 collective bargaining agreement. That agreement sought to discourage participating employers from withdrawing by extending the period for amortization of the Plan's unfunded liability over a longer period of time, thereby avoiding a substantial increase in required contributions. (R. 813-816)

Proceedings Below

Captain and Mrs. Chambless brought this action against the IOMM&P, the Plan, the Plan Trustees, the Plan Administrator, several former employers and two multi-employer bargaining associations. Plaintiffs alleged violations of the Employee Retirement Income Security Act of 1974 ("ERISA"), as well as of federal labor and antitrust laws. Jurisdiction was premised on: § 502(f) of ERISA, 29 U.S.C. § 1132(f); § 301 of the LMRA, 29 U.S.C. § 185; 15 U.S.C. § 15; 28 U.S.C. § 1331; and the doctrine of pendent jurisdiction. Plaintiffs sought restitution of allegedly forfeited pension benefits, a clarification of pension rights and treble damages, as well as damages for emotional distress and punitive damages. (Pet. App. A-7–A-9)

The District Court granted in part defendants' motion for summary judgment, dismissing the claims that: (1) defendants violated the antitrust laws; (2) the suspension of Chambless' pension benefits violated § 203(a) of ERISA, 29 U.S.C. § 1053(a); (3) the Plan's 1975 adoption of age 65 as normal retirement age was a sham; (4) the Plan was estopped from deferring Chambless' benefits; (5) Chambless' pension application failed to receive adequate review; and (6) the Plan improperly withheld information from Chambless. All claims against the employers and the multi-employer bargaining associations were also dismissed. (Pet. App. A-9)

Summary judgment was denied as to the claim that Amendment 47 to the Plan Regulations was arbitrary and discriminatory. Summary judgment was also denied on Chambless' claim that the Plan failed to give him adequate notice of Amendment 47. (*Id.*)

In its decision after trial the District Court found that the Plan had failed to advise Chambless fully of the effect that Amendment 47 would have on the calculation of his "wage-related" benefit upon retirement at normal retirement age, and that Amendment 47 caused an unlawful reduction of Chambless' pension benefit and was therefore arbitrary and capricious

as applied to him.[2] The District Court also concluded that Amendment 47 had been enacted primarily to protect the IOMM&P, rather than the Plan, and was therefore arbitrary and capricious "in any event." (Pet. App. B-9) The deferral of Chambless' benefits until age 65 was declared a nullity and the Trustees were ordered to approve his application for a pension and to calculate the amount of his monthly pension benefit as if he had applied in 1977, provided he ceased working in the maritime industry and applied for a pension within six months of the date of judgment. (Pet. App. A-10–A-11; B-14–B-15)

Judgment was entered on October 30, 1984. (Pet. App. B-14–B-15) Plaintiffs' motion to modify the judgment was denied by endorsement order dated November 30, 1984. (Pet. App. C-1–C-2) Thereafter, the Plan defendants appealed from the October 30, 1984 judgment. Plaintiffs cross-appealed from the summary judgment decision, as well as the judgment after trial.

In a decision dated August 28, 1985, the Court of Appeals affirmed the decision of the District Court in all respects. The Court of Appeals rejected as "unpersuasive" the Plan's contention that Amendment 47 was enacted to preserve and enhance the corpus of the Plan. (Pet. App. A-11) It held that the Plan had "failed to substantiate its claim of financial necessity and even failed to assert that alternative solutions were considered." (Pet. App. A-12) The court stated that the

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2 The Plan Regulations provide that a pensioner is entitled to receive the higher of a flat-rate pension benefit or a wage-related benefit based on the average of the pensioner's highest five years of "pay" (defined as salary earned in covered employment) during the ten years immediately preceding the effective date of his pension. Had Chambless actually retired in 1977, his wage-related benefit would have been $920 per month. Under Amendment 47, however, the effective date of Chambless' pension was postponed until he reached age 65. Assuming he did not engage in covered employment during that time, he would not have sufficient "pay" during the last ten years preceding the effective date of his pension to qualify for a wage-related benefit. The Plan therefore notified Chambless in 1980 that, upon retiring at age 65, he would receive a flat-rate benefit of $470 per month. (Pet. App. A-4, A-7)

Plan's position "was unsupported by any actuarial data," noting that the Plan's Actuarial Valuation for the year ending December 31, 1975 had not been transmitted to the Plan until February 1977, six months after Amendment 47 was enacted. It also noted that the Plan's Administrator had written a letter to participants one month before the Amendment was adopted in which he stated the Plan was "financially sound." (*Id.*)

The Court of Appeals also thought it significant that "Amendment 47 was of Union origin, drafted by Union counsel, and the record is devoid of evidence showing that the Amendment benefited the Plan or its participants." (Pet. App. A-12) It noted that "evidence was introduced" that the employer-designated Trustees and union-designated Trustees supported the Amendment for different reasons. (*Id.*)

Finally, the Court observed that in *Deak* v. *M.M.&P. Pension Plan*, No. 79-190, slip op. (M.D. Fla. June 4, 1984), Amendment 46 to the Plan Regulations had been held to be arbitrary and capricious.[3] Although the court did not hold that the *Deak* decision was entitled to collateral estoppel effect, it concluded that, "[g]iven the basic similarities between Amendments 46 and 47 and the fact that they were adopted at the same time," the District Court was correct in finding that Amendment 47 was also arbitrary and capricious. (Pet. App. A-13)

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3 Amendment 46, adopted contemporaneously with Amendment 47, provides that a pensioner who works as a licensed deck officer on a U.S. flag ocean going vessel for an employer not participating in the Plan "shall not be entitled to pension benefits for any month of such employment nor for any months prior to such pensioner reaching his Normal Retirement Age . . ." (Pet. App. A-5)

REASONS FOR GRANTING THE WRIT

The Standard Of Review Applied Below To Invalidate Amendment 47 Departs Radically From The Established Standard For Reviewing Trustees' Decisions Under ERISA

The Plan contends that Amendment 47 was adopted to enhance the financial integrity of the Plan and represents a reasonable exercise of the discretion afforded to the Plan Trustees under ERISA. The Court of Appeals rejected this contention and held that Amendment 47 was arbitrary and capricious and a "nullity." That decision raises substantial questions regarding the scope of judicial review of trustees' decisions and is in conflict with decisions of other circuit courts. This Court should grant certiorari in order to resolve those conflicts and to provide guidance to the lower courts, which are increasingly called upon to review the decisions of employee benefit plan trustees under ERISA.

The federal courts have uniformly held that the scope of judicial review of trustees' decisions is extremely limited. *See, e.g., Miles* v. *New York State Teamsters Conference Pension and Retirement Fund Employee Pension Benefit Plan*, 698 F.2d 593, 599 (2d Cir.), *cert. denied*, 464 U.S. 829 (1983) ("the lawful, discretionary acts of a pension committee should not be disturbed, absent a showing of bad faith or arbitrariness"); *Fine* v. *Semet*, 699 F.2d 1091, 1095 (11th Cir. 1983) (the justifications offered by pension plan trustees for their decisions "need not be compelling, only sufficient to take them out of the arbitrary mold"); *Ponce* v. *Construction Laborers Pension Trust*, 628 F.2d 537, 542 (9th Cir. 1980) (trustees' decisions may not be overturned unless the plaintiff demonstrates that they are "not grounded on any reasonable basis"). The courts below, while purporting to apply this standard, in fact applied a stricter standard of scrutiny that unduly encroached upon the discretion reserved for the Plan Trustees.

In concluding that the Plan had failed to substantiate its claim of "financial necessity," the Court of Appeals not only applied the wrong legal standard, but also misconstrued the justification offered for Amendment 47. The Plan does not contend that the amendment was necessary to ensure that there would be sufficient assets to pay claims for benefits then due. Rather, the enactment of Amendment 47 reflected the Trustees' concern that the Plan's contribution base was eroding due to declining employment in the maritime industry, thereby threatening the future stability of the Plan. Amendment 47 was intended to help arrest this trend by discouraging participants from taking jobs with employers who did not contribute to the Plan. This, in turn, would induce non-contributing employers to participate in the Plan, in order to obtain access to trained licensed deck officers. Certainly, nothing in ERISA requires pension plan trustees to focus solely on short-term considerations and to refrain from taking reasonable steps designed to ensure the long-term health of the plan.

Nor did the Court of Appeals conclude that Amendment 47 was an irrational response to the problem confronted. Rather, the court appears to have held that pension eligibility requirements must be supported by expert actuarial evidence of financial necessity and that the amendment was "arbitrary and capricious" because no such evidence was presented.

Although courts sometimes accord significance to the presence or absence of actuarial support for eligibility rules, *see, e.g.*, *Elser* v. *I.A.M. National Pension Fund*, 684 F.2d 648, 657 (9th Cir. 1982), *cert. denied*, 464 U.S 813 (1983); *Pompano* v. *Michael Schiavone & Sons, Inc.*, 680 F.2d 911, 914-15 (2d Cir.), *cert. denied*, 459 U.S. 1039 (1982), the Court of Appeals for the Ninth Circuit has held that the kind of pension eligibility rule involved here does not require actuarial evidence of "financial necessity." *Harm* v. *Bay Area Pipe Trades Pension Plan Trust Fund*, 701 F.2d 1301, 1306 n.7 (9th Cir. 1983).

In *Harm*, the Ninth Circuit upheld a rule providing for the suspension of benefits of pensioners who returned to work

anywhere in the pipe trades industry. The court distinguished *Elser, supra*, where it had affirmed a district court decision holding a plan's forfeiture of participants' past service credits arbitrary and capricious on the ground that the trustees had not offered any actuarial evidence to support their claim that the forfeiture provision was financially necessary. The *Harm* court summarized the principles that should govern a court's review of trustees' decisions under § 404(a):

> Only some decisions need be shown "necessary to protect the soundness of the Fund." If, as in *Elser*, the only explanation offered for a change in benefits is that it was compelled by financial necessity, there must be some evidence that such is the case. *Other rules may represent a choice among competing policies or rely on behavioral predictions that are not susceptible to verification.* In this latter group are the break-in-employment rules, which rest on the trustee's prediction that employees will be encouraged to seek continuing employment in the industry, rather than shift to other industries . . . *Rules that require policy selection or matching of actuarial probabilities to the conditions of an industry fall more fully to the trustees' discretion . . . The trustees can act in these areas without a showing of financial necessity.*

701 F.2d at 1306 n.7 (citations omitted, emphasis added).

As the Court of Appeals observed in *Harm*, break-in-employment rules, which rely on behavioral predictions, have been upheld in a number of cases, without any discussion of the need for expert actuarial testimony or proof of "financial necessity." *See, e.g., Sailer* v. *Retirement Fund Trust of the Plumbing, Heating and Piping Industry of Southern California*, 599 F.2d 913 (9th Cir. 1979); *Vermeulen* v. *Central States, Southeast and Southwest Areas Pension Fund*, 490 F. Supp. 234 (M.D.N.C. 1980). Amendment 47, though not a break-in-employment rule, was similarly predicated on the Trustees' behavioral prediction that participants would thereby be encouraged to seek continued employment with contribut-

ing employers, thus enhancing the future stability of the Plan. The ruling below—that the Plan's failure to present actuarial evidence of financial necessity reflected adversely on the reasonableness of Amendment 47—conflicts with these decisions and should be reviewed by this Court.

Significantly, the Court of Appeals did not reject the Plan's contention that the Actuarial Valuation and Review of the Plan for the year ending December 31, 1975 confirmed that the Plan's contribution base was shrinking. Rather, the court held that such evidence could not support Amendment 47 because it was not transmitted to the Trustees until six months after the amendment was enacted. That ruling is in conflict with a recent decision of the Court of Appeals for the Third Circuit. *Geib* v. *New York State Teamsters Conference Pension and Retirement Fund*, 758 F.2d 973 (3rd Cir. 1985).

In *Geib*, the Third Circuit affirmed a district court decision upholding a 1980 pension plan amendment that provided for the suspension of benefits to pensioners reemployed in the brewery industry. The court concluded that the amendment "had the dual purposes of bringing the plan into conformity with the reemployment provisions of ERISA and promoting the financial stability of the Fund." *Id.* at 973. More to the point, it held that the district court had not erred in relying on a 1982 actuarial report that supported the plan's contentions:

> Plaintiffs argue that the information in the 1982 report cannot be used to justify an action taken by the trustees in 1980. Although prepared in 1982, the actuarial report demonstrates a history of underfunding of the Brewery Fund extending back through previous years and thus supports the administrator's contention that the trustees' action was based in part on financial concerns.

Id. at 978.

Here, the Plan's Actuarial Valuation and Review for the year ending December 31, 1985 likewise confirms the industry trends about which the Trustees were concerned in enacting

Amendment 47. The refusal of the Court of Appeals to consider the significance of that report is in direct conflict with the approach taken by the Third Circuit in *Geib* and warrants this Court's review.

Other factors cited by the Court of Appeals also suggest that it applied an unduly strict standard of review. The court thought it significant that the Plan "failed to assert that alternative solutions were considered." (Pet. App. A-12) It is nowhere suggested, however, what "alternative solutions" existed to the problems facing the Trustees. In an action under § 404(a), the plaintiff carries the burden of proving that pension plan trustees acted in an arbitrary and capricious manner. *See, e.g., LeFebre* v. *Westinghouse Electric Corp.*, 747 F.2d 197, 208 (4th Cir. 1984). A plaintiff who alleges the existence of less restrictive alternatives to a pension eligibility rule should therefore be required at least to identify such alternatives; pension plan defendants should not be required to prove their non-existence.

Finally, the Court of Appeals attached unwarranted and unprecedented significance to the fact that Amendment 47 "was of Union origin [and] drafted by Union counsel." (Pet. App. A-12) Under § 302(c)(5) of the LMRA, the Plan is *required* to be administered by an equal number of employer-designated and union-designated trustees, *all* of whom inevitably have potential conflicts of interest. Drawing an inference of impropriety because one group of Trustees, rather than the other, proposed Amendment 47, and because a particular attorney prepared the first draft, was erroneous in light of the Plan structure mandated by § 302(c)(5). The Court should review this case to articulate the appropriate standard of review when § 404(a) of ERISA is considered in light of the structural requirements of the LMRA.

The issues raised here involve the very core of federal regulation of employee benefit plans. Because this Court has not previously given a full exposition of the standard of review

of trustees' decisions appropriate under ERISA, it should agree to do so now in order to provide guidance in this important and complex area.

CONCLUSION

For these reasons, the cross-petition for certiorari should be granted.

Dated: New York, New York
December 24, 1985

Respectfully submitted,

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BRIEF IN OPPOSITION TO A CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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MASTERS, MATES & PILOTS PENSION PLAN, et al.,
Cross-Petitioners.

BRIEF IN OPPOSITION TO A CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ARGUMENT

The issues that the pension plan cross-petitioners seek to raise involve the standard of proof that the pension plan was required to present in connection with its claim that the pension plan amendments were adopted on the basis of "financial necessity". (Cross-Petition, p. 11.) However, the pension plan's evidence on the financial issue failed on a much more prosaic basis than is set forth in the Cross-Petition.

The District Court's decision was predicated on findings that the testimony of Robert J. Lowen, the President of the M.M.&P. union, and the only witness that the pension plan presented on the subject, was not worthy of belief.

The District Court stated (B-13):*

> "Captain Lowen, Union President, on being deposed by plaintiff's counsel before trial, stated that he did not recollect the August 24, 1976 meeting of the trustees – the date Amendments 46 and 47 were adopted. (Lowen Dep. PP 194). He did not recall Bernard Epstein's review of the definition of retirement with the Joint Committee of Trustees at the August, 1976 meeting and did not recall what amendments Epstein had prepared. He did recall Amendments 46 and 47 from just having seen them. *Id.* 196-197. He did not recall having discussed the Amendments with Epstein before the meeting and had only a vague recollection of the meeting when the Amendments were discussed. *Id.* 198.
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> "Nonetheless, at trial on questioning by counsel for the plan Lowen launched into a long and extensive dissertation on the reasoning behind the amendments and the need to protect the integrity of the fund. It is clear that at the pretrial deposition Lowen deliberately frustrated plaintiff's right to discovery. Accordingly, his testimony concerning the basis for these amendments is striken and will not be considered by the court. F.R.Civ.P. 37."

This trial ruling obviously was within the discretion of the District Court, and presents no issue that warrants Supreme Court review.

Further, the findings of the District Court as affirmed by the Court of Appeals establish that the underlying motivation of the pension plan trustees was not financial; their motivation was to drive older employees out of the work force, in favor of "new young blood," by imposing an even "harsher penalty" upon those who, like Captain Chambless, opted to work in competitive employment when confronted by the humiliation of a "Hobson's choice" involving either demotion to entry-level positions or the forced abandonment of their careers in the guise of what is euphemistically called "retirement." (B-10-12)

Thus, the findings of the District Court establish that the motive of the pension plan trustees was not financial, but to establish a penalty for engaging in competitive employment. (B-10)

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* Citations with letter prefixes are to pages in the Appendix.

The existence of such a punitive motive is incompatible with the fiduciary duties of the pension plan trustees and inconsistent with the established principle that no forfeiture of benefits can be exacted for competing with an employer. *Hummel v. S.E. Rykoff & Co.*, 634 F.2d 446 (9th Cir. 1980).

CONCLUSION

There is no factual predicate for the issues which the pension plan trustees seek to raise in their Cross-Petition.

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Respectfully submitted.

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